GURDIT SINGH AJAIB SINGH

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMED DZAIDDIN J
[CRIMINAL APPEAL NO. 104 OF 1982]
22 NOVEMBER 1982

CRIMINAL LAW AND PROCEDURE: *Appeal by accused against sentence - Conviction under s. 454 Penal Code - Whether Court has jurisdiction to substitute for a charge under s. 380.*

CONSTITUTIONAL LAW: *Judges - Revisionary to alter a finding in an appeal against sentence*

The appellant was charged at the Magistrate's Court Kuala Lumpur on 26 June 1982 for an offence under s. 454 Penal Code (house-breaking in order to commit theft) and at the end of the trial he was convicted and sentenced to 4 years' imprisonment. He appealed against the sentence on the sole ground that it was manifestly harsh. At the onset of the appeal, the learned Deputy Public Prosecutor urged the Court to exercise its revisionary powers under s. 325 of the Criminal Procedure Code by substituting a conviction for a charge under s. 380 Penal Code as from the evidence in the Appeal Record, the appellant could not have been convicted for an offence under s. 454 Penal Code but instead should have been convicted for theft in a dwelling house punishable under s. 380 Penal Code.

Held:

[1] From the circumstances of the case, it was clear that the act of the accused could not have constituted an offence of house breaking under s. 454 of the Penal Code. The learned Magistrate should have considered this point at the close of the prosecution case.

[2] The unframed charge was available at the trial but the learned Magistrate had failed to scrutinise carefully the effect of the evidence of PW1 when he stated that he saw the accused coming out from the back part of the complainant's house and not from the house. For this reason alone, the accused should have been convicted for theft in a dwelling house.

[3] The evidence had raised the same issue of fact, i.e., theft, which is relevant to both ss. 454 and 380 of the Penal Code. Therefore applying the above principle and on the authority of *Sivalingam v. PP*, the Court was of the opinion that the requirements of ss. 166 and 167 of the Criminal Procedure Code were satisfied.

[4] As such, the Court substituted the conviction to one under s. 380 of the Penal Code and reduced the sentence to 3 years' imprisonment.

[Conviction substituted to one under s. 380 Penal Code. Sentence reduce to 3 years' imprisonment.]

Cases referred to:
Sivalingam v. PP [1982] 2 MLJ 172; [1982] CLJ (Rep) 330

Legislation referred to:
Courts of Judicature Act 1964, s. 31
Criminal Procedure Code, ss. 166, 167, 316(b), 325
Penal Code, ss. 380, 409, 420, 445, 454

Other sources referred to:
Mallal's Criminal Procedure Code, 4th Edn., p. 482

For the appellant - in person
For the respondent - Mohd. Shafee Abdullah, DPP

JUDGMENT

Mohamed Dzaiddin J:

This is an appeal against sentence. The appellant was charged at Jalan Duta Magistrate's Court on 26 June 1982 for an offence under s. 454 Penal Code (house-breaking in order to commit theft) and claimed trial. He was subsequently convicted and was sentenced to four years imprisonment.

His sole ground of appeal is that the sentence is manifestly harsh. At the onset of the proceeding, the learned Deputy Public Prosecutor pointed out that from the evidence in the Appeal Record, the appellant could not have been convicted for an offence under s. 454 Penal Code. Instead, he should have been convicted for theft in a dwelling house punishable under s. 380, Penal Code. He has therefore asked me to exercise my revisionary powers under the Criminal Procedure Code by substituting a conviction for a charge under s. 380, Penal Code.

My powers of revision are provided under s. 325 of the Criminal Procedure Code. These powers are consistent with s. 31 of the Courts of Judicature Act 1964. There are a number of authorities with regard to the powers of revision. In *Mallal's Criminal Procedure*, Fourth Edn., p. 482, it is stated as follows:

> The powers of revision are given to the High Court alone, and the powers of revision are given to the High Court in the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge. Their Lordships are clearly of opinion that when the High Court has before it on appeal a record of a criminal proceeding, the condition precedent is performed, and the High Court can then, though the record has only come to its knowledge in the appellate proceeding, proceed to exercise its revision powers if it chooses to do so," per Lord Atkin in *Chunbidya v. R.*, LR 62 IA 36; AIR 1935 PC.35.

The principles which should guide the Courts in the exercise of the revisionary powers have been clearly set out by Jenkins CJ in *R. v. Lachiram*, ILR 28 Bom 533 at p. 566 - see *Mallal's Criminal Procedure*, Fourth Edn., at P. 482.

Now, the next question for me to decide is whether or not I am permitted under the law to alter the conviction for another offence, i.e., under s. 380 of the Penal Code. The powers of the Judge of a High Court in an appeal against sentence to alter a finding is found in s. 316(b) of the Criminal Procedure Code where it is stated that at the hearing of the appeal the Judge may in an appeal as to sentence:

(i) reverse the finding and sentence and acquit or discharge the accused, or

(ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence.

In *Sivalingam v. PP* [1982] CLJ (Rep) 330, the Federal Court in a reference on a question of law of public interest held that in hearing an appeal from a conviction the power of the Judge to alter a finding must be exercised subject to ss. 166 and 167 of the Criminal Procedure Code. It is stated that the requirements of ss. 166 and 167 of the Code must be satisfied before a High Court in the exercise of its appellate jurisdiction alters or substitutes a

conviction for a different offence. It is further held that to warrant a substitution there must be clear evidence that a case for the substituted offence would have been made out or established in the Court below. In the case referred to, the accused was convicted and sentenced for an offence under s. 420 (cheating) of the Penal Code in the lower Court. He then appealed against conviction and sentence to the High Court. The appellate Judge found that an offence under s. 420 was not proved, but was satisfied that an offence under s. 409 (criminal breach of trust) had been established. He therefore substituted the charge to one under s. 409 of the Penal Code. He dismissed the appeal and maintained the conviction and sentence.

On reference to the Federal Court, Abdul Hamid FJ said as follows:

> Our law clearly allows the Judge of a High Court in an appeal against conviction to alter a finding. Section 316(b) provides that power. This is consistent with s. 26 of the Courts of Judicature Act which states that the appellate criminal jurisdiction of the High Court shall consist of the hearing of appeals from Subordinate Courts according to any law for the time being in force within the territorial jurisdiction of the High Court. Certain provisions of the Criminal Procedure Code general in nature are also relevant for purposes of hearing such appeals. Sections 166 and 167 of the Criminal Procedure code are examples of such provisions. In hearing an appeal from a conviction the power of the Judge to alter a finding must in our view be exercised subject to ss. 166 and 167 of the Criminal Procedure Code.
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> The requirements of ss. 166 and 167 of the Criminal Procedure Code must be satisfied before a High Court in the exercise of its appellate jurisdiction alters or substitutes a conviction for a different offence. Although therefore an appellate court is possessed of the power which it can lawfully exercise, it is equally essential that such power be exercised within the confines of the law. The question is to what extent and under what circumstances such power can be invoked. What is clear in our minds is, and we emphasise, that such power must be exercised under limited circumstances and with great caution subject to the restriction imposed by s. 167 of the Criminal Procedure Code, and it must be done so as not to prejudice the case of an accused.
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> In our view *Ng Ee's* case was correctly decided and to warrant a substitution there must be clear evidence that a case for the substituted offence would have been made out or established against the accused in the Court below. To put it in another way before there can be an alteration of a finding the appellate Court must be satisfied that if the substituted charge had in fact been the original charge, the proceedings at the trial, would have taken the same course, and the evidence record have been same. Further, if the substituted charge was one of the charges preferred against the accused or was an alternative charge the prosecution evidence would have been sufficient to satisfy the elements to constitute the charge and the accused's evidence must have been substantially unchanged in that the accused's defence would have been the same.

In the instant case, the appellant was charged and convicted under s. 454 of the Penal code. For this offence, the prosecution has to prove the following ingredients:

(1) that the accused committed house-breaking, the elements of which are contained in s. 445 of the Penal Code; and

(2) that he did so in order to commit theft.

According to the evidence of Sitiamparan a/1 Marimuthu (PW1), he said he saw the accused leaving the compound of the complainant's house at the time of the commission of the offence. He suspected the accused has stolen something. He then informed the towkay's wife. Both of them then gave chase and managed to stop the accused who threw away the slingbag. Under cross-examination, PW1 also stated that he saw the accused leaving the compound of his towkay's house. PW1 was the only eye-witness who saw the accused coming out of

the said compound. In such circumstances, it is clear that the act of the accused could not have constituted an offence of house-breaking under s. 454 of the Penal code. The learned trial Magistrate should have considered this point at the close of the prosecution case. In this regard, let me remind all trial Magistrates of their duty:

> It is the duty of the Court to scrutinise the charge at the commencement of every summary trial. An amendment may be made at any stage and, in general, the earlier the better but it is at the close of the evidence for the prosecution that the Court is in the best position to decide exactly what is the case which the accused is required to meet. It is therefore the express statutory duty of the lower Courts consider every charge at that stage and if necessary to amend it then. This is a point of forensic procedure and quite apart from the legal provisions regarding the framing of charges which relate mainly to practice in the prosecutor's chambers. It is a mandatory provision which should always be strictly observed". Per Taylor J in *Lew Cheok Hin v. Reg.* [1956] 22 MLJ 131 at p. 133.

Now, coming back to the present case, to warrant a conviction under s. 380 of the Penal Code, the prosecution must prove the following ingredients:

(1) that the subject-matter of theft is moveable property, i.e. a lady's slingbag;

(2) that it was in possession of a person;

(3) that the accused moved it dishonestly;

(4) that he did so without the consent of the person;

(5) that he did so intending to take it out of his possession;

(6) that the property stolen was from a building used as a dwelling house.

In my view, the main and necessary ingredient present in both s. 380 and s. 454 of the Penal Code is the commission of theft. In order to qualify the requirements of ss. 166 and 167 of the Criminal Procedure Code, there are two main tests required:

> First, the facts must be such that the unframed charge was available from the start and could have been framed and tried concurrently under s. 165; secondly, the evidence must have been presented in such away as to raise all the same issues of fact as would have been raised had the unframed charge been framed and trial claimed on it. Not only must the evidence for the prosecution be the same but the Court must be satisfied that the evidence for the defence would also have been the same". Per Taylor J in *Lew Cheok Hin v. Reg.* (*supra*) p. 134.

Applying these two tests to the present case, the unframed charge was available but the learned trial Magistrate failed to scrutinise carefully the effect of the evidence of PW1 when he stated that he saw the accused coming out from the back part of his towkay's house. PW1 stressed the fact that he saw the accused coming out from the compound and not from the house. For this reason alone, the accused should have been convicted for theft in a dwelling house. Secondly, the evidence has raised the same issues of fact, i.e., theft, which is relevant to both ss. 454 and 380 of the Penal Code. Therefore, applying the above principle and on the authority of *Sivalingam v. PP* (*supra*), I am of the opinion that the requirements of ss. 166 and 167 of the CPC are satisfied. As such, I substitute the conviction to one under s. 380 of the Penal code and reduce the sentence to three years imprisonment.

Also found at [1983] 1 CLJ 89